Supreme Court, U.S.
FILED

98 109 JUL 13 1998

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No. 98-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

MANUEL PARRA, MANUEL PARRA JR.,
ROSEANN PARRA, MARGARET PARRA, and
FRANCISCO PARRA,

Petitioners,

vs.

CITY OF CHINO, JAMES ANTHONY, ROGER PLANAS
RON VALLEJO, JEFF ALLISON, CHARLES SAMPLE
DANNY ROSS LAMASTER, and KEVIN DEVEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

1. Under what circumstances is it permissible for a police officer to cause or permit a dog to mutilate a person?

2. Does a human being have a constitutional right to defend him- or herself from a police dog attack where that attack constitutes unreasonable force?

3. Where the police search a home a second time, after having already verified in the first search that the suspect was not present, is the question of reasonableness of the second search, including a detention and pat-down search of a six-year old boy, a question of fact for the jury?

LIST OF PARTIES

Petitioners Manuel Parra, Manuel Parra, Jr., Roseann Parra, Margaret Parra, and Francisco Parra, were plaintiffs, appellants, and cross-appellees in the courts below. Respondents City of Chino, James Anthony, Roger Planas, Jeff Allison, Charles Sample, Danny Ross LaMaster, and Kevin Devey, the defendants and appellees in the courts below. In addition, Chino and Anthony were cross-appellants in the Ninth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

MANUEL PARRA, MANUEL PARRA JR.,
ROSEANN PARRA, MARGARET PARRA, and
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vs.

CITY OF CHINO, JAMES ANTHONY, ROGER PLANAS
RON VALLEJO, JEFF ALLISON, CHARLES SAMPLE
DANNY ROSS LAMASTER, and KEVIN DEVEY,

Respondents.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on March 2, 1998.

OPINIONS BELOW

The decision of the court of appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. The decision by the District Court for the Central District of California was not reported. A copy appears as Apx. C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on March 2, 1998. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 14, 1998. Apx. B-1. This petition for certiorari was filed July 13, 1998, within 90 days of April 14, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Proceedings Below

Petitioner Manual Parra ("Parra") is the father of petitioners Manuel Parra, Jr. ("Parra Jr."), Roseann Parra, Margaret Parra, and Francisco Parra. Petitioners sued the City of Chino, its chief of police, various Chino police officers, and Chino's trainer of its police dogs and police dog handlers (Danny Ross LaMaster) alleging violations of petitioners' Fourth Amendment rights. The children's claim was based upon the execution of an arrest warrant for their father's arrest. The claim was dismissed on summary judgment. Their father's claim, alleging excessive force during the course of his arrest, was tried to a jury which resulted in a judgment for defendants. Petitioners appealed; the Ninth Circuit affirmed.

2. Statement Of Facts

In the evening hours of February 14, 1991, Chino police officers, armed with an arrest warrant for plaintiff Manual Parra Sr., appeared at the front door of the Parra's residence. Mr. Parra lived there with his wife and four children, ages 6 to 12. The officers demanded admittance and then, without waiting and even though they had not been refused entry, forced their way inside. The officers did not find Mr. Parra. A short time later, another officer, defendant Planas, arrived and conducted a second search using his police dog. Over the protests of Mrs. Parra, Planas and his dog entered the bathroom where 9 year old Margaret Parra was showing. According to Margaret, Planas remained in the bathroom about 15 minutes. In their search the officers opened kitchen drawers. At least one officer had his gun drawn. Frankie, the six year old, started crying and threw up. An officer told him to go outside. There, the officer conducted a pat-down search of Frankie -- "for weapons" the Panel claims.

Memorandum decision at Apx. A2-A3; AOB[1] at 24-25.

Defendant Planas and another officer, using Planas' dog, eventually found Mr. Parra hiding in an adjoining storage yard.[2] While the facts are disputed over the extent of the dog attack and beating, and also whether it was more than one officer who struck Mr. Parra, there was no dispute that (1) the dog attacked and bit Mr. Parra repeatedly, (2) during the dog's attack, Planas, using his baton, struck Mr. Parra repeatedly (nine times according to Planas' count), including strikes on Mr. Parra's back and buttocks. Memorandum decision at 2-3; AOB at 6-8 (officers' version); AOB at 9-12 (plaintiff's version). But according to *everyone*, at no time did Mr. Parra strike, hit or kick, or attempt to strike, hit or kick, or threaten to strike, hit or kick, *anyone*:

> Q: Did Mr. Parra ever kick you?
> A: No.
> Q: Did Mr. Parra ever attempt to kick you?
> A: No.
> Q: Did Mr. Parra ever deliver a punch, that is a punch at you?
> A: No.
> Q: Did Mr. Parra ever attempt to deliver a punch at you?
> A: No.
> Q: Did you see Mr. Parra kick at some other police officers that night, February 14th, 1991?
> A: No.
> Q: Did you see Mr. Parra attempt to kick at some

---

[1] "AOB" is Appellants' Opening Brief filed in the Ninth Circuit.

[2] The Panel mistakenly states the dog attack occurred in "the backyard." Memorandum decision at A*2.

other police officer that night, February 14th, 1991?
A: No.

. . .

Q: Then the answer to the question is, he never delivered a punch to another police officer; isn't that right?

A: No.

Q: Did he deliver a punch?

THE COURT: That is no, right, when you said no?

THE WITNESS: No, that he never delivered a punch to any of us.

Q: Did you ever see him attempt to punch some other police officer that night, February 14th, 1991?

A: No.

* * * *

Q: Was [Mr. Parra] fighting with you?

A: He wasn't punching at me, no.

Q: Was he fighting with Officer Devey?

A: No.

RT 263:22-264:12, 265:5-15, 317:22-25 (Planas)

* * * *

Q: Did Mr. Parra say something to you, that is, at the point in time when you are trying to effect this control hold to the effect that he was going to try and use some weapon against you? Did he say anything like that to you?

A: No.

Q: Did you hear Mr. Parra say words to that effect, to the effect, I am going to try and use a weapon against whomever, Officer Devey or whatever? Did

you hear him say it to anybody?
A: No.

* * * *

Q: Was Mr. Parra threatening you at the time the dog was released?
A: No, he was not.

. . .

Q: Did he say anything to you which you interpreted as a threat of injury to you or someone else?
A: Not verbally say anything.
Q: Did you hear some other officer say something to you indicating that Mr. Parra was presenting a threat of injury to someone?
A: That he was verbally saying something?
Q: That the officer was observing Mr. Parra to be threatening injury to somebody?
A: No.
RT 297:6-15, 493:10-14, 493:20-494:4 (Planas).

The medical evidence was also undisputed that Mr. Parra sustained serious injuries from the dog attack and beating. AOB at 12-13; AER 408-09 (D1 through D12 [photographs of Parra's injuries admitted into evidence]).

3. Ninth Circuit Decision

The Panel affirmed summary judgment on the children's Fourth Amendment claims, and Parra's claim against LaMaster, the trainer of the police officer and his dog. The Panel stated the forced entry into the house was justified because Mrs. Parra, after telling the officers Mr. Parra would be right out, "then closed and apparently locked the door." Memorandum decision at Apx. A5-A6. This fact,

coupled with the officers' awareness that Mr. Parra had fled on earlier occasions, "satisfied the knock and announce requirement" and requirements of California law. *Id.* The Panel upholds the extent and scope of the search inside the house, including the searching of kitchen drawers, because "'a gun could be easily concealed and used by Mr. Parra in a surprise attack.'" Memorandum decision at Apx. A6. (quoting defendants' brief). Conducting a second search with a dog, including entering the bathroom where nine year old Margaret was showing, was also justified "because [the officers] knew Mr. Parra would hide or flee from them." Memorandum decision at Apx. A6-A7. The pat-down search of six year old Francisco was justified because his father was a "dangerous felon." Memorandum decision at Apx. A7.

The Panel rejected Mr. Parra's claim that the trainer could be held liable for instructing dog handlers to let the dog continue to attack and bite the person who does not become passive when bitten. Persons like Parra have no constitutional right of self defense. Apx. A-4. As to the police defendants, even though Parra had never threatened injury to anyone (and the Ninth Circuit did not claim otherwise), (1) "weeks earlier" Parra had broken into a house with a loaded gun and hid in a closet, (2) officers were executing a felony warrant and "were concerned that Parra would be armed and a danger to the public, (3) the officers saw Parra flee, (4) "the officers told Parra the dog would be called off if Mr. Parra stopped struggling," (5) Planas continued to beat Parra and let his dog attack because he thought Parra might be armed, and (6) the dog stopped biting when commanded to do so. Memorandum decision at Apx. A9.

REASONS FOR GRANTING THE WRIT

I. The Court Should Decide When It is Appropriate To Cause or Permit a Dog To Attack and Mutilate a Person.

Although only a small percentage of police are equipped with dogs, they account for a disproportionate number of injuries, especially serious injuries. For example, 15 LAPD dog handlers seriously injured as many people as the rest of the 8,000 officers combined. See record in *Nunley v. City of Los Angeles*, Ninth Circuit No. 95-56090; Petition for Writ of Certiorari No. 97-985.

The injuries inflicted by dogs are different. They always involve penetrating the skin. Scarring, sometimes quite grotesque, results. Animals attacks are especially frightening.

Severe infections are common. There is a substantial probability of vascular injuries. Body parts are sometimes bitten off. Occasionally, the dogs kill. *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

In Europe, "voracious dogs formed a part of a nobleman's equipment for hunting either animals or men." John Grier Varner and Jeannette Johnson Varner, Dogs of the Conquest (Univ. Oklahoma Press 1983) p. *xv*.

In the New World, the first recorded dogging of Indians occurred on the island of Jamaica on May 5, 1494, during the second voyage of Columbus. "The Indians fled in surprised terror, pursued by a great dog that bit them and did them much harm; for one dog against the Indians was worth ten men." Varner, *supra*, p. 5.

The dogs used by the conquistadors to subjugate the indigenous peoples were "*perro de presa* (capture dogs)." Varner,

supra, pp. *xv*, 130. The *monteria infernal* (man hunt) was common sport. *Id.*, p. *xv*. "[T]he Indian was merely another savage animal, and the dogs were trained to pursue and rip apart this human quarry with the same zest as they felt when hunting wild beasts." *Id.*, p. 193.

Dogs killed millions. Eventually the Crown intervened and ordered the dogs killed. "We are informed that in that province there are some large dogs that are fed by throwing them on Indians and permitting them to do great damage. Since it is not fitting that anyone should possess or breed such dogs, those that are now alive should be destroyed at once." *Id.*, p. 150.

In the United States, dog were used on slaves. As reported in *Moran v. Davis*, 18 Ga. 722 (1855), in 1852 the State of Georgia found it necessary to specifically prohibit owners, hirers and overseers of slaves from "unnecessarily biting or tearing [slaves] with dogs." *Id.* at 724.

After the Civil War, a war crimes tribunal tried and hanged Confederate Captain Henry Wirz for his use of dogs to mutilate escaped prisoners. N.P. Chipman, *The Tragedy of Andersonville, Trial of Captain Henry Wirz -- The Prison Keeper* (1911) at 410-412, *reprinted as The Andersonville Prison Trial* (1990) ("The tracking hounds would have been sufficient to discover the prisoners, and as they are usually harmless, would have served the purpose of the pursuer and at the same time inflicted no injury upon the pursued.")

The Nazi extermination camp Treblinka is remembered in the nightmares of its few survivors not just for its gas chambers. Addicted to the infliction of human suffering, guards deployed Kommandant Franz Stangl's dog "Bari" "to attack people, and specifically their genital regions, on command" as they were herded naked down the chute to their doom at the hands of "Ivan the Terrible." Sereny, *Into That Darkness* -- An Examination of

Conscience 202 (1974).[3]

Courts have recognized that using animals to cause harm raises special concerns. In *Miller v. United States*, 404 F.2d 611(5th Cir. 1968), the court described using a dog to extract a confession as "subhuman and vicarious animalism." 404 F.2d at 612. In *United States v. Dicesare*, 765 F.2d 890, 901 (9th Cir. 1985) Judge Reinhardt observed that "the intrusion of these dogs is offensive to some, frightening to others, and, sadly, to at least a few, reminiscent of the ugliest types of scenes that have occurred in police states." In *People v. Black*, 23 Cal. App. 4th 667, 672, 28 Cal. Rptr. 2d 546 (1994) the defendant's conviction for injuring a police dog was reversed because the jury was not instructed that "an arrestee may use reasonable force to defend against excessive force."

Recent medical studies have shown that injuries inflicted by police dogs are far more serious than injuries from untrained dogs, K. Bradford Snyder, MD, Michael J. Pentecost, MD, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS OF EMERGENCY MEDICINE 983 (September 1990), and that the primary victims are persons of color. H. Range Hudson, MD, et al., *Law Enforcement K-9 Dog Bites: Injuries, Complications and Trends*, ANNALS OF EMERGENCY MEDICINE 637 (May 1997).

Many consider mutilation of the human body taboo. "If the body is cut or disfigured, or if it loses any of its parts, it will remain

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[3] The largest supplier of police dogs in the United States is Adlerhorst Kennels International, Inc., of Riverside California. "Adlerhorst" (in English, "Eagle's Nest"), was Hitler's retreat in the Bavarian Alps. W. L. Shirer, The Rise and Fall of the Third Reich p. 436 (1959). The dog in this case was imported from eastern Germany.

in a condition of perpetual imbalance, and the damaged person not only will become frequently ill but may be physically incomplete during the next incarnation." A. Fadiman, The Spirit Catches You And You Fall Down 33 (1997).

The law of mayhem, *e.g.*, California Penal Code § 204, protects the integrity of the victim's person. The rationale of the crime is the preservation of the natural completeness and normal appearance of the human face and body. Disfiguring injuries are considered to be very serious because they may be a daily reminder of the underlying event and of the emotional disability that frequently attends a disfiguring injury. Injuries which cause physical scarring are disfiguring injuries. *People v. Page*, 104 Cal. App. 3d 569, 578, 163 Cal. Rptr. 839, 843 (1980) (application of permanent tattoos to victim's body is mayhem); *People v. Newble*, 120 Cal. App. 3d 444, 451, 174 Cal. Rptr. 637, 640 (1981) (inflicting three inch long scar is mayhem); *People v. Keenan*, 227 Cal. App. 3d 26, 36, 277 Cal. Rptr. 687, 693 (1991).

II. The Court Should Determine Whether The Fourth Amendment's Reasonableness Standard Includes Some Right Of Self-Defense.

Parra sued LaMaster claiming that "LaMaster trains the police to allow the dogs to continue to pursue[4] an individual as long as the individual-arrestee is 'fighting, trying to get away . . .' Thus, Parra claims LaMaster violated his right to defend himself against a dog's attack." Memorandum decision at Apx. A4. The Ninth Circuit panel quickly rejected the claim, citing an earlier panel decision in *Quintanilla v. City of Downey*, 84 F.3d 353, 354 n.1 (9th Cir. 1996) in which the court Circuit held there is no constitutional right of self-

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[4] "Pursue" is the Ninth Circuit's term. Petitioner contends the appropriate and accurate phrase is "attack" or "bite."

defense as against excessive force:

> Plaintiff [Quintanilla] also argues that the district court erroneously refused to instruct the jury with regards to self-defense. We summarily dispose of this contention because it has no basis in the law, and is therefore without merit.
>
> 84 F.3d at 354 n.1. (See Memorandum decision at Apx. A4.)

Even though here Parra never threatened injury to *anyone*, the Ninth Circuit upholds the training of the police to inflict grievous injuries on persons because a person bitten has no right to defend himself from a police dog attack. In short, in the Ninth Circuit the rule is that a person attacked by a large aggressive dog should simply not struggle and become passive.

Quintanilla v. City of Downey, 84 F.3d 353, 354 n.1 (9th Cir. 1996), was simply wrong when it concluded there is no constitutional right to self-defense as against a police dog attack. A human being, even a drug addict, will try to protect himself from having his bodily tissues torn asunder through an animal attack.

The right of self-defense is well-grounded in law. *People v. Curtis*, 70 Cal. 2d 347, 356-57 & n.7, 74 Cal. Rptr. 713, 450 P.2d 33 (1969) (California Supreme Court holds that suspect always retains right of self-defense as to any force that is excessive); *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991) (Fourth Circuit reverses summary judgment in police dog bite case because a "jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog bites his scrotum."); *People v. Black*, ___ Cal. App. 4th ___, 28 Cal. Rptr. 2d 546, 548-49 (1994) (trial court committed reversible error in failing to instruct on suspect's

right of self-defense as against a police dog attack). As another panel of the Ninth Circuit observed in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994):

> Given the violent nature of Volker's attack on Chew and considering the fact that Volker was still engaged in biting him when the officers came upon the scene, it is not surprising that Chew was responding by hitting the dog with a metal pipe.
>
> *Chew v. Gates*, *supra*, at n.7.

"'[T]he integrity of an individual's person is a cherished value of our society.'" *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (*quoting Schmerber v. California*, 384 U.S. 757, 772, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Thus, this Court should grant review to overrule *Quintanilla* and affirm that the right of self-defense is inherent in a person's right to be free from excessive force.

III. THE COURT SHOULD GRANT REVIEW TO HOLD THAT THE REASONABLENESS OF A SEARCH, EVEN THOUGH PURSUANT TO A WARRANT, IS A QUESTION OF FACT FOR THE JURY.

Initially, it must be noted that the Memorandum decision misstated the facts when it stated that Mrs. Parra "apparently locked the screen door." Apx. A5. Mrs. Parra never locked the screen door; at most, she put her hand on it to keep it closed. E.g., AER at 137.[5]

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[5] Francisco Parra testified:

> Q: At the time that the officer put his hand through the screen, did your mother have her hand on the door from the inside?

Indeed, defendants have never claimed that Mrs. Parra locked the door. Appellees'/Cross-Appellants' Opening/Answering Brief, at 55 ("Mrs. Parra attempted to hold the door shut, and an officer pushed his hand through the screen and entered, at which point Mrs. Parra let go of the door.").

The Ninth Circuit panel holds that it is enough to comply with "knock notice" if officers announce their presence and purpose. Yet the law has never held that compliance with "knock notice" is met merely upon an officer's statement of identification and his authority. An officer may "break open any outer or inner door or window of a house, or any part of a house or anything therein," only after "*he is refused admittance*." Cal. Penal Code § 1531 (emphasis added). Here, the question of fact for the jury was whether the officers provided enough time for Mr. Parra to respond. One may not infer "refusal" of admittance from Mrs Parra's statement that her husband "would come to the door." *Jeter v. Superior Court*, 138 Cal. App. 3d 934, 188 Cal Rptr. 351 (1983) (court holds that the absence of any response for 20 seconds after they knocked and announced their purpose, at 11:00 a.m. in the morning, 138 Cal. App. 3d at 936, did not constitute a refusal justifying forcible entry); *People v. Webb*, 36 Cal. App. 3d 460, 111 Cal. Rptr. 524 (1973) (court holds that forced entry after waiting 30-45 seconds after knocking violated § 1531).

The Memorandum decision is also dismissive of the claim that opening and searching of drawers was unreasonable. Yet the officers

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A: When he put his hand in there, she let go.
Q: But she had been holding the door?
A: Yes.
Q: Had she been holding the door apparently to keep the officers from coming inside?
A: Yes.
AER at 137 (lines 4-13).

had a warrant for the arrest of a *person*. That contraband or a gun might have have been found in drawers is no justification for the search. You do not justify an unauthorized search by what you might have found.

The Memorandum decision also upholds the search of the house a *second* time, including letting an officer and his dog search a bathroom where a nine year old girl was showering, all conducted *after* the officers had verified that Mr. Parra was gone. How many times do officers get to search? Twice? Three times? While there may be instances where a second search can be justified, should a court say that as a matter of law the second search is *always* justified?

Of course, this was not the home of a judge that was searched. Nor are the children offspring of "fine upstanding citizens." But if that is what the Fourth Amendment turns on, then a court should say so. Why delude people of lower classes into thinking they have Fourth Amendment rights? Come out in a published opinion and tell them they have none. It'll clear the courts' dockets. And no one can then accuse the courts of intellectual dishonesty and hypocrisy.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE NINTH CIRCUIT

FILED
MAR 2 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 96-55218
D.C. No. CV94-00003 RT (JRx)

MANUEL PARRA; VIVIAN PARRA; MANUEL PARRA JR.; ROSEANN PARRA; MARGARET PARRA; FRANCISCO PARRA,

Plaintiffs-Appellants

vs.

CITY OF CHINO; JAMES ANTHONY; ROGER PLANAS, #719; RON VALLEJO, #688; JEFF ALLISON, #716; CHARLES SAMPLE, #467; DANNY ROSS LAMASTER; KEVIN DEVEY, in both their personal and official capacities,

Defendants-Appellees.

No. 96-55271
D.C. No. CV94-00003 RT (JRx)

MANUEL PARRA; VIVIAN PARRA; MANUEL PARRA JR.; ROSEANN PARRA; MARGARET PARRA; FRANCISCO PARRA,

Plaintiffs-Appellees,

vs.

CITY OF CHINO; JAMES ANTHONY; ROGER PLANAS, #719; RON VALLEJO, #688; JEFF ALLISON, #716; CHARLES SAMPLE, #467; DANNY ROSS LAMASTER; KEVIN DEVEY, in both their personal and official capacities,

Defendants-Appellants.

Appeal from the United States District Court
For the Central District of California
Robert J. Timlin, District Judge, Presiding

MEMORANDUM*

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted January 7, 1998
Pasadena, California

Before: LAY,** GOODWIN and SCHROEDER, Circuit Judges.

Manual Parra Sr. brought a § 1983 action against the city of Chino and several of its police officers for using excessive force to arrest him. On February 14, 1991, officers went to Parra's home to execute a felony arrest warrant. Mrs. Parra told the officers that her husband would come to the door in a moment and closed the screen door. The officers then broke the screen in the door, entered the house and

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**Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

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searched for Parra. Not finding him, officer Planas searched the house again with a police dog. Planas took the police dog into the family's bathroom where Parra's nine-year old daughter was taking a shower. During this time, officer Allison took Parra's six-year old son outside the house and patted him down for weapons. AER at pp. 147-48.

Planas and Devey then searched the backyard area and saw Parra attempting to flee. After instructing Parra to stop, the officers released the police dog and gave the dog a "search" command. The dog found Parra, bit him in the foot and pulled Parra off a truck. While Parra struggled with the dog, the dog bit him five times in the arm, leg and foot. At the same time, Planas hit Parra several times on the back and buttocks with his baton. The incident lasted twenty to twenty-five seconds. Once Parra was subdued, Planas commanded the dog to release its bite, and it released Parra.

Parra brought a § 1983 action against the City of Chino, Chief of Police James Anthony and officers Roger Planas and Kevin Devey, claiming the police officers used unnecessary and unreasonable force in arresting him. Parra also sued Dan LaMaster, who trained the police officers to handle police dogs, claiming inadequate training caused, in part, Parra's injuries. Parra's children brought a § 1983 claim against the City of Chino, Police Chief Anthony and the police officers claiming a violation of their Fourth Amendment rights.

The trial court granted LaMaster's motion for summary judgment, finding that LaMaster was entitled to a "good faith" defense. AER at p. 325. The court also granted the city's motion for summary judgment to dismiss the Fourth Amendment claims brought by Parra's children, finding that the searches of the Parra house and the youngest child, Francisco, were reasonable. Id. At pp. 328-29. The jury trial was bifurcated into two liability stages. In the first stage, the jury considered only the liability of officers Devey and Planas. It found the officers did not violate Parra's constitutional

rights and returned a verdict in their favor. Thereafter, based upon the jury's answer to the special verdict form that Parra was not subjected to unreasonable force during the course of his arrest on February 14, 1991, the court dismissed the case as to all defendants.

I.

Parra initially appeals the summary judgment dismissal of his claim against LaMaster. To state a claim for relief under § 1983, a plaintiff must establish: (1) the defendant acted under color of state law; and (2) the defendant caused him to be deprived of a right secured by the Constitution and laws of the United States, Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997)(citing Howerton v. Gabica, 708 F.2d 380, 382 (9th Cir. 1983)). Parra claims that LaMaster trained Chino police officers to use dogs to attack and bite unreasonably. Parra asserts that LaMaster trains the police to allow the dogs to contiue to pursue an individual as long as the individual-arrestee is "fighting, trying to get away..." Thus, Parra claims LaMaster violated his right to defend himself against a dog's attack.

This court has implicitly recognized that there is no such constitutional or federal right to defend oneself against a dog attack. Quintanilla v. City of Downey, 84 F.3d 353, 354, n.1 (9th Cir. 1996)("Plaintiff also argues that the district court erroneously refused to instruct the jury with regards to self-defense. We summarily dispose of this contention because it has no basis in the law, and is therefore without merit."). We conclude Parra failed to establish a § 1983 case against LaMaster because he has not identified a constitutional or federal right LaMaster has allegedly violated.[1] Under

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[1]Furthermore, Parra cannot maintain his § 1983 claim against LaMaster for training officers to use unreasonable force because the jury found officers Planas and Devey had not used unreasonable force in arresting Parra. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)(per curiam).

the circumstances, we need not pass upon whether LaMaster enjoyed a good faith defense.

II.

Parra's children brought a § 1983 claim against the City of Chino, Chief Anthony and the first line officers for violating their Fourth Amendment rights against unreasonable searches and seizures. The children allege their rights were violated by: (1) unlawful entry into their home; (2) unreasonable searches inside their home; (3) the presence of the police dog in the bathroom while Parra's nine-year old daughter was taking a shower; and (4) an unreasonable search [sic] Parra's six-year old son. The district court dismissed the children's claims, finding that the manner of entry into the Parras' home and the searches conducted therein were reasonable. AER at pp. 328-29. The district court also concluded that the searches were justified and necessary to make sure there were no weapons on the premises, and the defendant officers were therefore entitled to qualified immunity. Id. At p. 329.

1. Entry Into the House

While an arrest warrant founded upon probable cause implicitly conveys limited authority to enter a dwelling where the police have the reason to believe the suspect lives (Payton v. New York, 445 U.S. 573 (1980)), police must knock and announce their presence and purpose before entering a dwelling by force. 18 U.S.C. § 3109 (1994); Cal. Penal Code § 1531 (1982). A failure to knock and announce constitutes a violation of the Fourth Amendment. United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994).

In the instant case, police officers knocked on the Parras' front door, announced their presence and told Mrs. Parra they were looking for Mr. Parra. Mrs. Parra told officers Mr. Parra would be right out, and then closed and apparently locked the screen door. At that point, one of the officers pushed his hand through the screen and

opened the door. The officers knew Parra had previously fled from police, and had reason to believe that Parra would resist arrest again. Based on these facts, the officers satisfied the knock and announce requirement. Furthermore, the forceful entry made by the police officers after the knock and announcement substantially complied with the requirements of Cal. Penal Code § 844.[2]

2. Searches Conducted Inside the House

Parras' children contend the officers' search of kitchen cupboards and drawers, and their search of the house with the police dog, exceeded the scope of the arrest warrant. They also argue the search of the bathroom with the dog while Parra's daughter was taking a shower was unreasonable.

An arresting officer may, upon reasonable suspicion, conduct a "protective sweep" of premises, incident to arrest, for the purpose of protecting the safety of the officers. Maryland v. Buie, 494 U.S. 325, 327 (1990). The defendants admit that the officers searched the kitchen drawers, but state that "the officers only looked in areas where a gun could be easily concealed and use by Mr. Parra in a surprise attack." (City of Chino's Brief at p. 57). We find this search was reasonable in light of the circumstances.

Furthermore, officer Planas' search of the home with the police dog appears justified. The police were executing a valid felony arrest warrant, could not find Parra in the house with a visual inspection, and thus used the dog to search for Parra. The search of the bathroom in whihc Parra's daughter showered, while unfortunate,

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[2]"[A] peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired." Cal. Penal Code §844 (1985).

also appears reasonable. The officers testified they did not believe Mrs. Parra when she said her daughter was taking a shower because they knew Mr. Parra would hide or flee from them. They therefore could have reasonably suspected that Parra was in the bathroom. In conclusion, we find the searches conducted within the Parra home were reasonable.

3. Pat Down Search of Francisco Parra

The Parras' contend, and the defendants concede, that officer Allison told six-year old Francisco to step outside the house with him and gently patted his waist and hips to make sure he was not carrying a weapon. The defendants describe this frisk as part of their protective sweep of the area, conducted for the purpose of ensuring the officers' safety.

"When the police...have a reasonable suspicion that a suspect is armed, a Terry pat down for weapons is permissible." United States v. Flippin, 924 F.2d 163, 166 (9th Cir. 1991). Police may also conduct Terry frisks of third parties found in or around a residence. See United States v. Patterson, 885 F.2d 483, 484-85 (8th Cir. 1989); United States v. Bonds, 829 F.2d 1072, 1075 (11th Cir. 1987). A Terry frisk constitutes a search, but is reasonable if the officer has a reasonable suspicion that the person may be carrying a weapon. United States v. Thomas, 863 F.2d 622, 628 (9th Cir. 1988).

We find the frisk of Francisco did not constitute an unreasonable search. The officers justifiably believed Parra was a dangerous felon, and their apprehension in the Parra home was warranted. Moreover, officer Allison's patdown of Francisco was very minor; the officer merely ran his hands over the boy's hips and pockets. We therefore affirm the district court's grant of summary judgment in favor of the defendants.

III.

Parra challenges the district court's denial of his motion for judgment as a matter of law. Parra argues there was insufficient evidence to support the jury's verdicts in favor of the defendant officers. We review a denial of a motion for judgment as a matter of law de novo. McClaran v. Plastic Industries, Inc., 97 F.3d 347, 354 (9th Cir. 1996). In reviewing a denial of a motion for judgment as a matter of law, we will reverse a jury's verdict only "if the evidence, construed in the light most favorable to the non-moving party, allows only one reasonable conclusion and that conclusion is contrary to that reached by the jury." Acosta v. City of San Francisco, 83 F.3d 1143, 1145 (9th Cir. 1996).

Parra first contends no reasonable jury could conclude that the use of the dog and the baton against him did not constitute deadly force,[3] i.e. force that could cause death or serious bodily injury. What constitutes deadly force depends on the object's capacity, in the manner of its use, to endanger one's life, not the nature of the object itself. United States v. Moore, 846 F.2d 1163, 1166 (8th Cir. 1988). The defendants submitted evidence that Munko, the police dog that bit Parra, was a friendly, even-tempered and highly trained dog. RT at pp. 386, 377, 379, 380. Munko had been trained to search for a suspect and bark upon finding him. Id. at pp. 288, 361. The dog was also trained to "bite and hold" when a suspect acts aggressively or tries to flee. Id. at p. 274. In this incident, Munko continued to bite Parra only while Parra tried to flee. Id. at pp. 292-93, 295-96. Upon

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[3]In Vera Cruz v. City of Escondido, 126 F.3d 1214 (9th Cir. 1997), this court held that under Tennessee v. Garner, 471 U.s. 1 (1984), "deadly force" means "that force which is reasonably likely to cause death." Id. At p. 12606. Because this was not the definition of "deadly force" used at the time of Parra's trial, the reasonableness of the jury's verdict is evaluated under the prior definition of "deadly force" – force that creates a substantial risk of causing death or serious bodily harm.

receiving the release command, Munko immediately released his hold of Parra. Id. at pp. 416-417. Based on this evidence, we find a reasonable jury could conclude that this particular use of a police dog did not constitute deadly force.

Assuming deadly force was not used in this case, we then consider whether the jury could reasonably conclude that Planas' use of Munko and his baton under the circumstances did not constitute unreasonable force. The defendants offer the following facts to show that the force used was not unreasonable: (1) the officers knew that weeks earlier Parra had broken into a house wiht a loaded gun and hid in a closet; (2) the officers were executing a felony arrest warrant and were concerned that Parra would be armed and would endanger the public; (3) the officers saw parra attempt to flee from the backyard; (4) the officers told Parra the dog would be called off if Parra stopped struggling; (5) Planas decided to let Munko continue biting Parra and to use his baton on Parra because he thought Parra might have been armed; and (6) Munko released his hold immediately upon command.

Based on this evidence, it appears a reasonable jury could have concluded that the force usedf was reasonable. If the jurors believed that Planas thought Parra could have been armed and dangerous, and that Parra's flailing during the incident was an attempt to flee rather than an atttempt to defend himself, then the jurors could also reasonably conclude that Planas took appropriate action under the circumstances. The fact that Parra, as a convicted felon, possessed a firearm and broke into a house only weeks earlier could have justified Planas' belief that Parra could be dangerous. We conclude there was sufficient evidence to support the jury's verdict, such that the district court's denial of Parra's motion for judgment as a matter of law was proper.

IV.

Parra appeals the denial of his motion for a new trial. Parra alleges the district court erred by: (1) refusing to give his jury instructions Nos. 1 and 49 to the jury; (2) making several evidentiary rulings in favor of the defendants; and (3) bifurcating the trial. We review a denial of a motion for a new trial for clear abuse of discretion. Rinehart v. Wedge, 943 F.2d 1158, 1159 (9th Cir. 1991).

1. Refusal of Jury Instructions Nos. 1 & 49.

A failure to instruct on an appropriate theory of the case is a question of law reviewed de novo. Stewart v. Ragland, 934 F.2d 1033, 1042 (9th Cir. 1991). In reviewing jury instructions, this court "consider[s] the charge as a whole to determine whether it is misleading or misstates the law to the prejudice of the objecting party." Jenkins v. Whittaker Corp., 785 F.2d 720, 730 (9th Cir. 1986).

In Vera Cruz, this court held that: "To be entitled to a deadly force instruction, a plaintiff must present evidence that the force used, in the circumstances under which it was used, posed more than a remote possibility of death." 126 F.3d at 1217. In Quintanilla, this court found that the evidentiary record could not support a deadly force jury instruction because: (1) the plaintiff did not suffer life threatening injuries or require significant medical treatment; (2) the dog was trained to release on command and did release when commanded; and (3) there was no evidence presented fo the dog's capacity to harm. 84 F.3d at 358.

While Parra's injuries were slightly more severe than Quintanilla's injuries, this case is factually similar to the facts of Quintanilla. Munko was trained to release upon command and did in fact release Parra immediately after the command was given. Furthermore, as discussed above, the evidence showed Munko was a well-trained, well-behaved dog with little propensity to be unduly

aggressive. We therefore conclude Parra was not entitled to his deadly force instruction.

The district court also refused to give Parra's instruction No. 49, which contained a lengthy definition of "serious bodily injury." Parra argues the district court's instruction was too cursory and did not acknowledge that risk of serious infection constitutes serious bodily injury. We find the instruction submitted to the jury did not misstate or misconstrue the law. We therefore conclude the district court did not err in refusing Parra's jury instruction.

2. Evidentiary rulings

Evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent a showing of prejudice. Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1470 (9th Cir. 1992).

a. Exclusion of the videotape of police dog training

The district court excluded a videotape of a police dog attack because its probative value was substantially outweighed by its prejudicial effect. RT at pp. 1526-27. Parra's only claim of prejudice is that he could not use the tape to impeach Planas' testimony that a suspect's typical response to a dog attack is to become submissive. Parra apparently wanted to show that the person on the tape acted inconsistently with Planas' testimony. This assumes that the videotaped response is typical of most suspects. The district court found there was not foundation for such an assumption. Id. at p. 1527. Thus, Parra could not have used the tape to impeach Planas even if it were admitted into evidence for other reasons. Thus, Parra was not prejudiced by the exclusion. We find the district court did not err in excluding the videotape.

b. Admission of testimony regarding Parra's prior arrest

The district court admitted testimony regarding Parra's prior

arrest into evidence because it showed the officers knew, prior to the execution of the arrest warrant, that Parra possessed a gun. RT at p. 77. Parra argues the prejudicial effect of the testimony outweighs its probative value. Parra also claims the district court improperly admitted the evidence for impeachment purposes.

Contrary to Parra's assertion, the district court did not admit the evidence for impeachment purposes. Id. Instead, the testimony was admitted to show what the officers knew of Parra prior to the execution of the felony arrest warrant. The evidence bears directly upon the question of whether the officers acted reasonably. We find the district court did not abuse its discretion by admitting the testimony.

c. Testimony regarding Parra's drug use the day of the arrest

The district court allowed the defendants to admit evidence showing that Parra used a small amount of heroine the day of his arrest, and used marijuana and/or alcohol about twenty minutes before the arrest, because the evidence was relevant to Parra's credibility and to his ability to remember and recollect. RT 28-29. Parra argues the evidence was prejudicial and had no probative value because: (1) the jury would conclude Parra is a bad person because he used drugs; and (2) there was no evidence introduced showing that the drugs impaired Parra's ability to recall.

The evidence had probative value because it related to Parr's credibility and ability to remember. The district court noted that because the parties' versions of the events in question differed significantly, determining credibility and ability to recall was important to the jury. Parra suggests the evidence could have had a prejudicial effect on the jury, but makes no argument showing that the prejudicial effect outweighs the evidence's probative value. Accordingly, the district court did not abuse its discretion by admitting

the drug use evidence.

3. Bifurcation of the trial

Finally, Parra contends the district court erred by bifurcating the trial such that the first line officers' liability would be determined separately from the determination of the police department's and police chief's liability for maintaining the "bite and hold" policy. Under Rule 42(b), a district court may separate the adjudication of claims "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Fed.R.Civ.P. 42(b). A district court decision to bifurcate a trial is reviewed for abuse of discretion. Exxon Co. v. Sofec, Inc., 54 F.3d 570, 575 (9th Cir. 1995).

Parra argues it was impossible for the jury to determine whether the officers' actions were reasonable without also considering whether the police department policy condoning those actions was reasonable. The wording of the special verdict obviated this potential problem. The first special verdict stated: "Did defendant Roger Planas (Planas) cause plaintiff Manuel Parra (Parra) to be subjected to unreasonable force during the course of Planas's arrest of Parra on February 14, 1991, in violation of Parra's rights under the Fourth Amendment..." AER at p. 443. A similar special verdict was submitted for defendant officer Devey. The jury answered "no" to both questions. As constructed, the special verdict form does not allow for the jury to separate any police policy from the particular actions taken by the officers such that the jury could decide the particular actions were reasonable but the policy of using dogs was unreasonable. Instead, the special verdict asked the jury to determine only whether a violation of Parra's Fourth Amendment rights had occurred. Therefore, the construction of the special verdict form avoided any prejudicial effect the bifurcation could have otherwise had in this case. We find the district court was justified in bifurcating the trial.

We conclude the district court did not err in making its evidentiary and procedural decisions challenged by Parra on appeal. Therefore, we affirm the district court's denial of Parra's motion for a new trial.

AFFIRMED.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 14 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MANUEL PARRA; VIVIAN PARRA; MANUEL PARRA, JR.; ROSEANN PARRA; MARGARET PARRA;

Plaintiffs-Appellants/Cross-Appellees,

v.

CITY OF CHINO; JAMES ANTHONY; ROGER PLANAS, #719; RON VALLEJO, #688; JEFF ALLISON, #716, CHARLES SAMPLE, #467; DANNY ROSS LAMASTER; KEVIN DEVEY, in both their personal and official capacities,

Defendants-Appellees/Cross-Appellees.

No. 96-55218 and 96-55271

D.C. No. (CV 94-00003-RT (JRx)

ORDER

Before: LAY,* GOODWIN, and SCHROEDER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court as been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

ENTERED
NOV 14 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION
DEPUTY

FILED
NOV - 9 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MANUEL PARRA,

Plaintiffs,

v.

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(D)

ROGER PLANAS AND KEVIN DEVEY,

Defendants.

Case No. EDCV94-0003 RT (JRx)

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on September 25, 1995, the Honorable Robert J. Timlin, Judge, presiding.

A jury of nine persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues as to each defendant Roger Planas (Planas) and defendant Kevin Devey (Devey). The jury deliberated and thereafter returned into Court with its separate verdicts as to Planas and Devey consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words as follows:

given thereto by the jury, which said verdict was in words as follows:

As to defendant Planas:

We, the jury in the above entitled action, answer the following questions as our Special Verdict, such answers being based on findings by a preponderance of the evidence.

QUESTION NO. 1:

Did defendant Roger Planas (Planas) cause plaintiff Manuel Parra (Parra) to be subjected to unreasonable force during the course of Planas's arrest of Parra on February 14, 1991, in violation of Parra's rights under the Fourth Amendment to the Constitution of the United States?

(Answer 'Yes' or 'No'.) No

* * * *

If you answered 'No', the Foreperson should sign and date this Special Verdict form.

Date: 10/12/95 /s/ Douglas K. Ogburn

Foreperson

* * * *

As to defendant Devey:

We, the jury in the above entitled action, answer the following questions as our Special Verdict, such answers being based on findings by a preponderance of the evidence.

QUESTION NO. 1:

Did defendant Kevin Devey (Devey) cause plaintiff Manuel Parra (Parra) to be subjected to unreasonable force during the course of Devey's arrest of Parra on February 14, 1991, in violation of Parra's rights under the Fourth Amendment to the Constitution of the United States?

(Answer 'Yes' or 'No'.) No

* * * *

If you answered 'No', the Foreperson should sign and date this Special Verdict form.

Date: 10/12/95 /s/ Douglas K. Ogburn
Foreperson

* * * *

It appearing by reason of said special verdicts that defendants Planas and Devey are entitled to judgment against plaintiff,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that defendants Planas and Devey, and each of them, have judgment against plaintiff and plaintiff shall take nothing against them and that defendants Planas and Devey recover from plaintiff costs in the sum of $_____.

DATED: 11/9/95

/s/
ROBERT J. TIMLIN
United States District Judge

CASE NO. EDCV94-0003 RT

Parra

VS. Chino

PLAINTIFF'S EXHIBIT 40

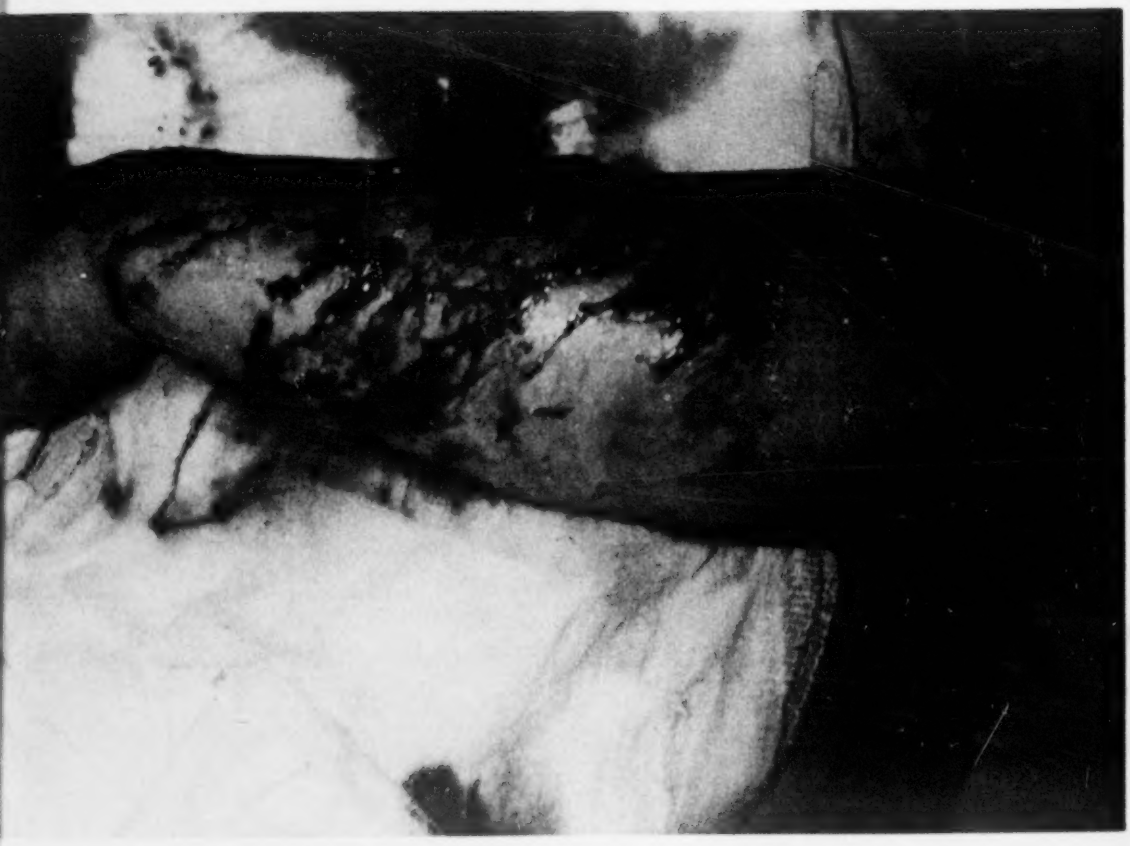
DATE 9/ IDEN.

DATE 9/25/95 EVID.

BY ST

AO 386 Deputy Clerk

D-1



CASE NO. EDCV 94-0003 RT

Parra

VS. Chino

PLAINTIFF'S EXHIBIT 42

DATE 9/25/95 IDEN.

DATE 9/25/95 EVID.

BY [signature]
Deputy Clerk

AO 386

D-2

CASE NO. EDCV94-0003 RT

Parra

VS. Chino

PLAINTIFF'S EXHIBIT 44

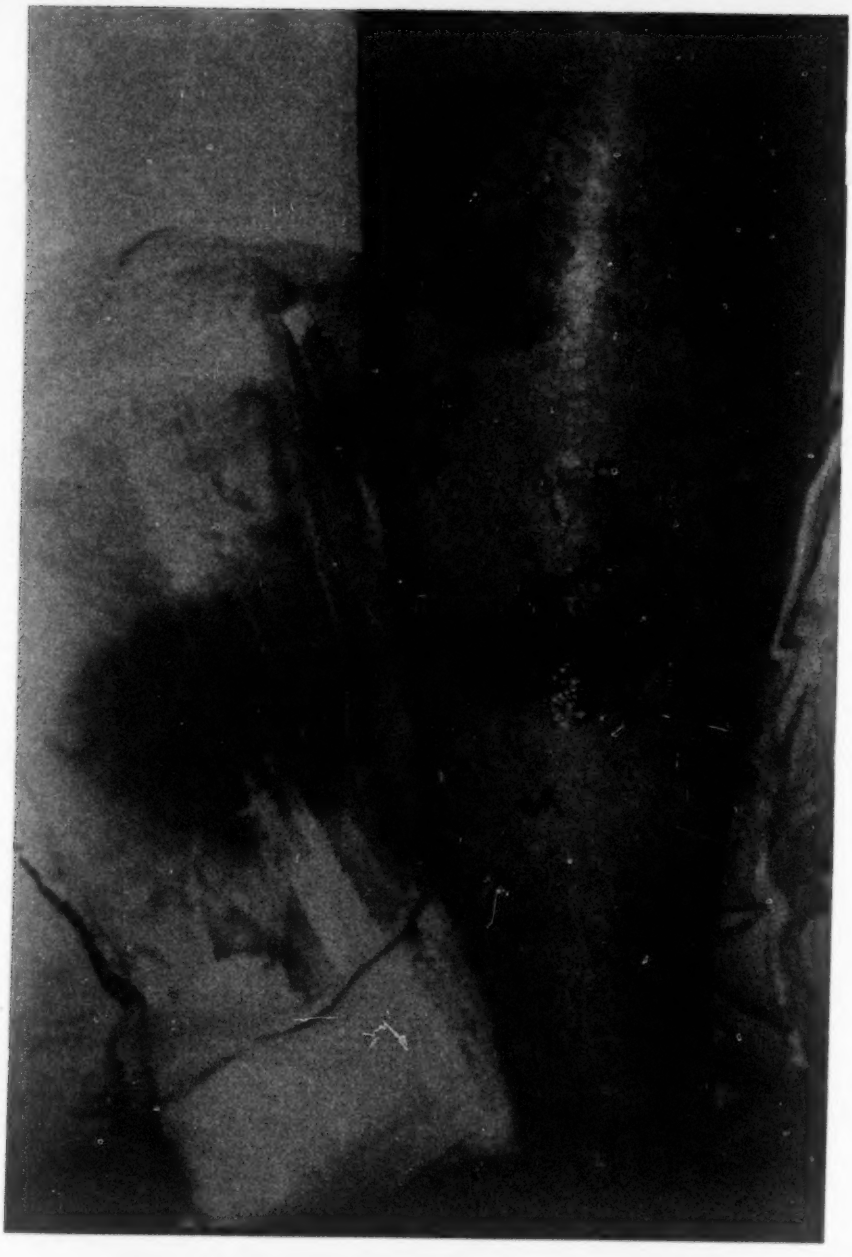
DATE 9/25/95 IDEN.

DATE 9/25/95 EVID.

BY LP
Deputy Clerk

AO 386

D-3



CASE NO. EDCV94-0003-RT

Parra

VS. Chino

PLAINTIFF'S EXHIBIT 46

DATE 9/25/95 IDEN.

DATE _____ EVID.

BY _____

AO 386 Deputy Clerk

401

D-4

CASE NO. EDCV 94-0003 RT

Parra

VS. Chino

PLAINTIFF'S EXHIBIT 47

DATE 9/ IDEN.

DATE 9/25/95 EVID.

BY LP

AO 386 Deputy Clerk

O-5

CASE NO. EDCV94-0003 AT

Parra

VS. Chino

PLAINTIFF'S EXHIBIT 48

DATE 9/ IDEN.

DATE 9/25/95 EVID.

BY [signature]
Deputy Clerk

AO 386

D-6

CASE NO. EDCV94-0003 RT

PARRA

VS. Chino

PLAINTIFF'S EXHIBIT 49

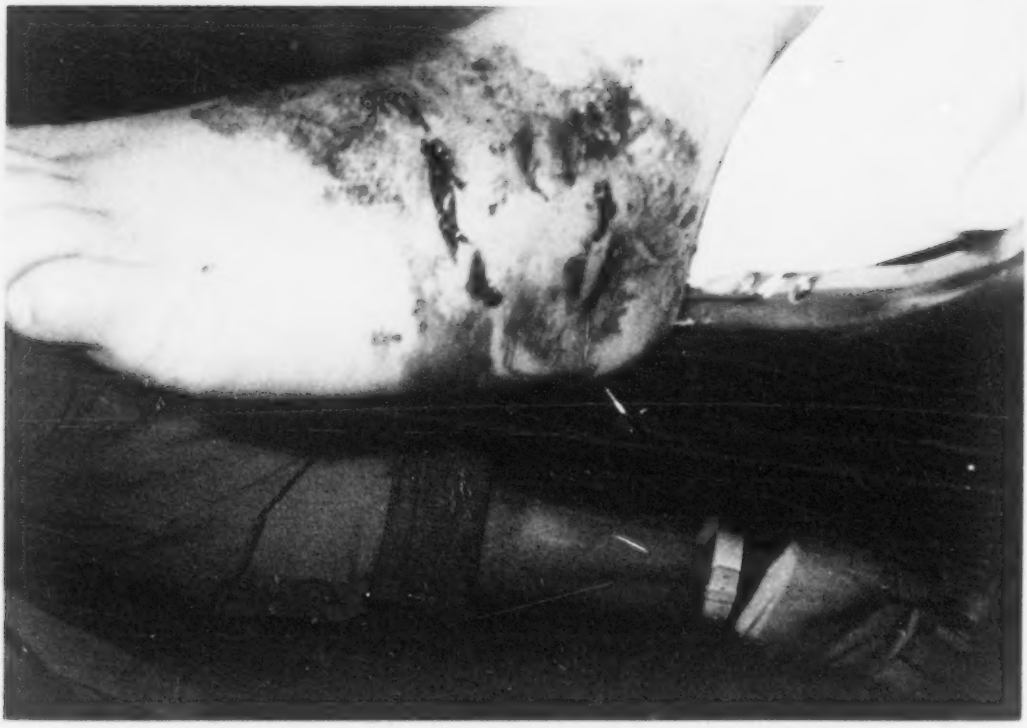
DATE 9/ IDEN.

DATE 9/25/95 EVID.

BY

AO 386 Deputy Clerk

D-7



CASE NO. ED CV94-0003 RT

Parra

VS. Chino

PLAINTIFF'S EXHIBIT 50

DATE 9/15/95 IDEN.

DATE 9/15/95 EVID.

BY LG
Deputy Clerk

AO 386

D-8

CASE NO. EDCV94-0003 RT

Parra

VS. Chino

PLAINTIFF'S EXHIBIT 51

DATE 9/25/95 IDEN.

DATE 9/25/95 EVID.

BY [signature] Deputy Clerk

AO 386

D-9

CASE NO. EDCV94-0003 RT

PARRA

VS. Chino

PLAINTIFF'S EXHIBIT 52

DATE 9/25/95 IDEN.

DATE EVID.

BY
Deputy Clerk

AO 386

TRIAL
EX. 53

D-11

TRIAL
EX. 54

D-12